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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-142

CLEVE COLE, Alias,

Petitioner,

v.

STATE OF TENNESSEE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE STATE OF TENNESSEE COURT OF CRIMINAL APPEALS

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MAY IT PLEASE THE COURT:

The respondent, State of Tennessee, in opposition to the petition for writ of certiorari in the instant case would respectfully suggest to the court that certiorari should be denied.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals of Tennessee affirming the judgment of conviction in the trial court

was filed on 3 January 1973. On 20 February 1973 the Supreme Court of Tennessee denied the petitioner's request for certiorari without opinion. The pertinent opinion is appended to the petition.

JURISDICTION

Respondent adopts petitioner's jurisdictional statement.

STATEMENT OF THE CASE

The petitioner was convicted of the offense of concealing stolen property of a value not exceeding $100 in violation of Tennessee Code Annotated Section 39-4218 on 7 October 1971. The Court of Criminal Appeals of Tennessee affirmed the trial court's conviction on 3 January 1973. The Supreme Court of Tennessee rejected his petition for certiorari by an order dated 20 February 1973. Petitioner now seeks a writ of certiorari to the Court of Criminal Appeals of Tennessee.

QUESTIONS FOR REVIEW

The question for review is restated as follows:

Whether the petitioner was denied his right of freedom from self-incrimination guaranteed by the Fifth and Fourteenth Amendments by the trial judge's charge to the jury that the unexplained exclusive possession of stolen property may warrant a finding of guilty knowledge of the larceny.

ARGUMENT

I.

THE CHARGE TO THE JURY CONCERNING THE PRESUMPTION OF EXCLUSIVE POSSESSION OF RECENTLY STOLEN PROPERTY DID NOT DENY THE PETITIONER HIS RIGHT TO BE FREE FROM SELF-INCRIMINATION.

It is submitted that the decision of the Court of Criminal Appeals of the State of Tennessee was eminently correct in determining that the charge to the jury was not an unconstitutional comment upon the petitioner's failure to take the stand and testify in his own behalf. The trial court had charged:

> "You are further instructed that the unexplained exclusive possession of stolen property shortly after commission of the theft may warrant a finding that the possessor has guilty knowledge of the larceny. And unless this exclusive possession of stolen property after larceny, is accounted for in a straight-forward, truthful way, and unless the jury finds the explanation reasonable and satisfactory, the jury would be warranted in returning a verdict of guilty of receiving or concealing stolen property." See Appendix A to the petition.

The defendant contends that the above-quoted charge to the jury amounted to a comment upon his failure to take the stand. The State notes that the charge does not refer to the petitioner's failure to testify.

As the intermediate appellate court noted, the charge correctly stated the law concerning the ***prima facie*** probative effect of evidence introduced by the prosecution. See ***Tackett v. State***, 443 S.W.2d 450, 223 Tenn. 176 (1969); ***Myers v. State***, 470 S.W.2d 848, ... Tenn.Crim.App. ... (1971).

Such a presumption concerning the unexplained possession of recently stolen goods also arises in the federal system. See *Prince v. U.S.*, 217 F.2d 838 (6th Cir. 1955); *McAbee v. U.S.*, 294 F.2d 703, 111 U.S.App. D.C. 74 (D.C. Cir. 1961), certiorari denied 368 U.S. 961, certiorari denied 371 U.S. 863, certiorari denied 382 U.S. 854.

Thus, it is apparent that the charge of the trial judge was not inappropriate, but rather was a correct statement of the law in the majority of jurisdictions in the United States.

CONCLUSION

The petition for certiorari should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Supreme Court has been forwarded by U. S. Mail this 4th day of September, 1973 to Mr. Cleve Cole, 830 Anderson Ave., Knoxville, Tenn. 37921.

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